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<cn> 5 <ct> Shareholder activism and litigation against UK banks – the limits of company law and the desperate resort to human rights claims?

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## <a> I. INTRODUCTION

Any study of shareholder litigation against directors of listed companies risks concluding almost as soon as it has begun. A major reason for this is the general lack of such cases, especially when a comparison is made with other common law jurisdictions such as the US and Australia.<sup>1</sup> In contrast there has been much more shareholder litigation in regard to UK private companies. Most shareholder derivative claims in the UK and Australia involve private companies and not public companies.<sup>2</sup> One might have expected to find that the

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<sup>1</sup> See generally J. Armour, B.S. Black, B.R. Cheffins and R. Nolan, ‘Private Enforcement of Corporate Law: An Empirical Comparison of the UK and the US’ (2009) 6 *Journal of Empirical Legal Studies* 687; M. Legg, ‘Shareholder Class Actions in Australia: The Perfect Storm’ (2008) 31 *University of New South Wales Law Journal* 669.

<sup>2</sup> See generally J. Loughrey, A. Keay and L. Cerioni, ‘Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance’ (2008) 8 *Journal of Corporate Law Studies* 79; R. B. Thompson and R.

recent financial crisis might have provided opportunities for legal actions to be brought against directors of loss-making banks and other financial institutions, but this has not happened.

Bank depositors have been reassured by an enhanced depositor protection scheme and have returned to the prevailing level of trust that they tended to have for banks before the crisis. The crisis facing highly leveraged financial institutions was triggered by a liquidity crisis. This liquidity crisis saw banks refuse to lend to each other because of their fears concerning the quality of the securities being offered – this crisis of trust between banks continues to some extent today. So, what are the prospects for further litigation? Banks are unlikely to sue each other for the failures that have occurred as they all have similar stories to tell and their relationships with each other are too important to be damaged by public litigation.<sup>3</sup> What then are the prospects for shareholder litigation in response to misconduct or breach of duties in UK banks? The short answer is that shareholder litigation is unlikely, reflecting a broader failure of corporate law in the Anglo-American world.<sup>4</sup>

## <a> II. SOME CORPORATE LAW THEORIES ON SHAREHOLDER ACTIVISM

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S. Thomas, 'The Public and Private Faces of Derivative Lawsuits', (2004) 57 *Vanderbilt Law Review* 1747; R. B. Thompson and R. S. Thomas, 'The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions' (2003) 57 *Vanderbilt Law Review* 133; and I. Ramsay and B. Saunders, 'Litigation by Shareholders and Directors: An Empirical Study of the Australian Statutory Derivative Action' (2006) 6 *Journal of Corporate Law Studies* 397.

<sup>3</sup> This pattern was identified some years ago by Macaulay in regard to business litigation in general; see further S Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55.

<sup>4</sup> See generally K. Greenfield, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (Chicago, University of Chicago Press, 2006); T. Frankel, *Trust and Dishonesty: America's Business Culture at a Crossroad* (Oxford, Oxford University Press, 2006).

Those who study organisations have noted that a number of options are available to those who are dissatisfied with the way in which their organisation is operating. Hirschman famously referred to the options which he described in the title of his book as ‘Exit, Voice and Loyalty’.<sup>5</sup> In the context of shareholder action a variety of combinations of these strategies is available. Thus, the resort to the ‘exit’ option may see shareholders simply sell their shares and exit the company.

At the other end of the spectrum from the exit option is the ‘loyalty’ option under which shareholders remain docile and hold on to their shares for the long term. However, a small group of loyal shareholders may voice their concerns, but they are usually a small minority, as most make a rational calculation that any action upon their part will be too costly. Thus some bank shareholders may simply have high levels of trust in their banks and banks often emphasise the importance of trust for their business. Many people have a high degree of trust in their banks, even though they may distrust individual bankers.<sup>6</sup>

Exclusive resort to the ‘voice’ option may see shareholders seeking to engage with directors and senior management of the company to voice corporate governance concerns. As we have seen, voice may also be associated with either exit or loyalty decisions. Voice may take a variety of forms; one of these is the resort to litigation against the company or its officers. However this litigation option encounters another general obstacle in the form of

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<sup>5</sup> A.O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, Harvard University Press, 1970).

<sup>6</sup> P. Sapienza and L. Zingales, ‘Financial Trust Index the Results: Wave IV’ Chicago Booth/Kellogg School, at: <http://www.financialtrustindex.org/resultswave4.htm>; M. Knell and H. Stix, *Trust in Banks? Evidence from Normal Times and from Times of Crises*, (Working Paper 158), Vienna, Oesterreichische Nationalbank, 2009.

what Olson referred to as ‘the logic of collective action’.<sup>7</sup> Individual rational calculations regarding the cost of litigation will dissuade some shareholders from taking action on their own unless their costs are significantly lower than those of others. In this context it is interesting to note that action against BAE Systems in regard to bribery allegations was taken by a public interest group, Corner House, and not by its larger shareholders.<sup>8</sup> It may be that public money would be well spent funding similar public interest actions against banks.

Reviewing the nature of legal claims that shareholders might make is important in the context of the dominance of the director primacy model in managing companies. This model promotes maximising shareholder wealth, but leaves all critical business decisions in the company to the board and the company’s management. This need not be a bad thing if directors are well-qualified and are not subject to constant pressure to achieve short term performance goals. These pressures, to a large degree, come from institutional investors themselves.<sup>9</sup> So rather than being seen as the solution, short-term oriented institutional investors may actually be part of the problem.

There are many ways of looking at the roles that are uppermost in the minds of shareholders; the approach shareholders take to their role in the company will indicate what response can or should be expected of them with regard to the enforcement of their legal rights and claims; the particular perspective adopted may not lead to litigation and might simply lead to the use of the ‘exit’ option of sale of shares. Thus, insofar as public companies

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<sup>7</sup> M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Harvard University Press, 1971).

<sup>8</sup> See further *R (on the Application of Corner House Research Campaign) v Director of the Serious Fraud Office and BAE Systems plc* [2008] EWHC 714 (Admin).

<sup>9</sup> See for example L. E. Mitchell, ‘The Board as a Path Toward Corporate Social Responsibility’ in D. McBarnet, A. Voiculescu and T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge, Cambridge University Press, 2007).

are concerned, Jennifer Hill pointed out that there has been a massive movement away from the nineteenth century view of shareholders as owners, even if the nexus of contracts view points to a principal–agent relationship between shareholders and directors.<sup>10</sup>

This saw a move to Berle’s view of shareholders as beneficiaries for whom managerial powers were held by directors in trust, but where shareholders were not to participate in corporate governance.<sup>11</sup> With the rise of large corporations this trust-orientated view has been discredited by judges in more recent times. Another view of shareholders was that of ‘bystanders’ to managerial power in the ascendancy; this view continued into the twentieth century. On some occasions, shareholders have been seen as participants in a system of private government within the corporation which has seen the advocacy of corporate constitutionalism by writers such as Bottomley.<sup>12</sup>

A variation of the view of the shareholder as bystander is that of shareholders as investors who merely contribute capital without wanting to have a role in managing the company, as Henry Manne had articulated it.<sup>13</sup> Yet another version of the shareholder role identified by Hill is that of the shareholder as guardian or monitor of managerial decision-making.

Finally, Hill points to an emerging and somewhat disturbing image of the institutional shareholder as a ‘Managerial Partner’ with management in the task of controlling the

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<sup>10</sup> J. Hill, ‘Visions and Revisions of the Shareholder’ (2000) 48 *American Journal of Comparative Law* 39.

<sup>11</sup> A.A. Berle, ‘Corporate Powers as Powers in Trust’ (1931) 44 *Harvard Law Review* 1049. The contrary view was expressed by Dodd in M.E. Dodd, ‘For Whom are Corporate Managers Trustees?’ (1932) 45 *Harvard Law Review* 1145.

<sup>12</sup> S. Bottomley, ‘From Contractualism to Constitutionalism: A Framework for Corporate Governance’ (1997) 19 *Sydney Law Review* 277.

<sup>13</sup> H. Manne, ‘Our Two Corporation Systems: Law and Economics’ (1967) 53 *Virginia Law Review* 259 at 260–261.

company's decision making. Hill notes that this partnership between institutional investors and management helps to legitimize managerial power and maximize outcomes for shareholders.; The dark side of this phenomenon is that it is occurring at the same time as labour interests are being 'decollectivised' which has seen a decline in employee wages whilst executive remuneration has skyrocketed.<sup>14</sup>

In such a situation of proximity between institutional shareholders and corporate management, the prospects for institutional shareholder litigation against management are probably much reduced. This is especially so because the managers of institutional investment funds are themselves rewarded in the same way as managers of the companies in which they invest. In the US Lawrence Mitchell has noted that:

<quotation>The problem is that institutions had their own short-term pressures. In particular, their compensation systems were structured in a manner that rewarded fund managers for their quarterly performance. If the institutions – or those who managed them – were to use their power for anything, the natural financial incentive would be for them to use their power to increase their own compensation. And so they did.<sup>15</sup></quotation>

It would be surprising if similar tendencies were not evident in the UK.

### <a> III. IN THE SHADOW OF THE WALKER REVIEW

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<sup>14</sup> See J. Hill, 'Visions and Revisions of the Shareholder' (2000) 48 *American Journal of Comparative Law* 39, text around footnotes 171 to 184.

<sup>15</sup> L. E. Mitchell, 'The Board as a Path Toward Corporate Social Responsibility' in D. McBarnet, A. Voiculescu and T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge, Cambridge University Press, 2007) at 301. Also see L. E. Mitchell, *Corporate Irresponsibility: America's Newest Export* (New Haven, Yale University Press, 2001).

One of the findings from official inquiries into the global financial crisis and its effects in the UK is that shareholders were remarkably docile during the height of the market euphoria, with little if any effort being made by them to constrain banks from their more risky business strategies; this applied to small shareholders as well as to larger institutional investors. The final report of the Walker Review into corporate governance in UK banks and other financial institutions noted that ‘there appears to have been a widespread acquiescence by institutional investors and the market in the gearing up of the balance sheet of banks as a means of boosting returns on equity’.<sup>16</sup> In other words banks were allowed to assume significantly increased indebtedness by shareholders who hoped for greater dividends or rises in the value of shares. Shareholder greed therefore played a part in explaining their docility. This had the effect of aggravating various problems experienced by banks.

Traditionally, it is believed that shareholders should be able to deal with many of the internal problems of the corporation by using internal mechanisms, such as the election and dismissal of directors and the passage of resolutions at general meetings. However, these tools are not as effective as our legal theory of self-regulating corporations would assume. It is therefore left to other market mechanisms, such as price signals and the threat of takeover, to challenge directors or to gain their attention in listed companies.

However the theory that poor corporate governance in a company will lead to a new management team seeking to take over the company is often questionable as many other

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<sup>16</sup> D. Walker, *A Review of Corporate Governance in UK Banks and other Financial Industry Entities: Final Recommendations* (26 November 2009) at para 5.10. This can be contrasted with the view that it is not reasonable to expect institutional investors to shoulder the bulk of the burden of corporate governance since regulators, auditors and professional bodies also have a role to play in the corporate governance of banks and other financial companies, see F. Curtiss, I. Levine and J. Browning, ‘The Institutional Investor’s Role in Responsible Ownership’ in I. MacNeil and J. O’Brien (eds) *The Future of Financial Regulation* (Oxford, Hart Publishing, 2010).



reasons usually drive takeover activity (as with the Cadbury takeover by Kraft) and companies that have been the subject of a takeover are not necessarily any more efficient and often fail. Takeover rules may also constrain shareholders and directors to a large extent.<sup>17</sup>

Walker approached this problem in terms of failures in the responsibility of shareholders as owners; he noted that they would often simply sell their shares if they had concerns about the company, and he therefore called for a more effective stewardship role for major shareholders. He explained that:

<quotation>As a matter of public interest, a situation in which the influence of major shareholders in their companies is principally executed through market transactions in the stock cannot be regarded as a satisfactory ownership model, not least given the limited liability that shareholders enjoy.<sup>18</sup></quotation>

In some respects this was a repeat of a call by the Hampel Committee to bring about an increased governance role for institutional investors.<sup>19</sup> Similar efforts were also made in the subsequent Myners report.<sup>20</sup> However, this strategy has not been without its critics.<sup>21</sup>

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<sup>17</sup> See generally D. Kershaw, 'The Illusion of Importance: Reconsidering the UK's Takeover Defence Prohibition' (2007) 56 *International and Comparative Law Quarterly* 267.

<sup>18</sup> D. Walker, *A Review of Corporate Governance in UK Banks and other Financial Industry Entities: Final Recommendations* (26 November 2009) at para 5.7.

<sup>19</sup> R. Hampel, Committee on Corporate Governance, *Report of the Committee on Corporate Governance*, (London, Gee, 1998).

<sup>20</sup> P. Myners, *Institutional Investment in the UK: A Review* (London, HM Treasury, 2001).

<sup>21</sup> See for example R. Webb, M. Beck and R. McKinnon 'Problems and Limitations of Institutional Investor Participation in Corporate Governance', (2003) 11 *Corporate Governance: An International Review* 65.

Often, fund managers and senior management of companies have been more concerned with short-term share prices than with longer term performance of their companies. Walker therefore urged that fund managers consider adopting a ‘commitment to a stewardship obligation’ where this could be done within the terms of their mandate so as to more effectively hold company management to account. As he observed:

<quotation>Some governance by owners is essential, at least in respect of the selection, composition and performance of boards, if boards and the executive of listed companies are to be appropriately held to account in discharge of their agency role to their principals. Shareholders who do not exercise such governance oversight are effectively free-riding on the governance efforts of those that do.<sup>22</sup></quotation>

Not surprisingly, Walker found that the failure of institutional investors to seek to engage with management of banks and other financial institutions meant that they had ‘little impact in restraining management before the recent crisis phase...’<sup>23</sup> He observed generally that:

<quotation>Company performance will be influenced, directly or indirectly, actively or passively, by the initiatives and decisions that shareholders or their fund management agents take or choose not to take.<sup>24</sup> </quotation>

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<sup>22</sup> D. Walker, *A Review of Corporate Governance in UK Banks and other Financial Industry Entities: Final Recommendations* (26 November 2009) at para 5.8.

<sup>23</sup> Ibid at para 5.10.

<sup>24</sup> Ibid at para 5.2.

This observation applies as much to internal efforts to engage with management as to external efforts, such as the pursuit of litigious strategies, although Walker would no doubt frown upon the use of the latter. As already noted, often disgruntled shareholders may simply decide to sell their shares if they are unhappy with the way that a company is being managed. This might be a ‘blunt’ means of communicating discontent of a major shareholder to the board, but it may also be justified by institutional investors in view of the fiduciary duties owed by fund managers.<sup>25</sup> Thus while the exit option is a blunt form of market signalling, it is also necessary to examine what internal mechanisms are available to discontented shareholders who are prepared to take action of this kind.

The Walker Report strongly advocates use of the ‘engagement option’ and takes the view that such early intervention will save money in the long run.<sup>26</sup> Walker urged the adoption of ideas found in the Code of Responsibility of Institutional Investors (prepared by the Institutional Shareholders’ Committee in 2009) and the reissue of these principles, almost unchanged, by the Financial Reporting Council as a Stewardship Code. Principle 5 of the Code states that ‘Institutional investors should be willing to act collectively with other investors where appropriate.’<sup>27</sup>

The Stewardship Code also uses the familiar ‘comply or explain’ model; fund managers would be required to clearly state on their websites whether they adhered to the Stewardship Code, or to some other business model if the Stewardship Code is seen as being too onerous,

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<sup>25</sup> *ibid* at para 5.2; also see generally the discussion in G. Stapledon, ‘Institutional Investors: What are their Responsibilities as Shareholders?’ in J. Parkinson, A. Gamble and G. Kelly (eds) *The Political Economy of the Company* (Oxford, Hart Publishing, 2000).

<sup>26</sup> D. Walker, *A Review of Corporate Governance in UK Banks and other Financial Industry Entities: Final Recommendations* (26 November 2009) at para 5.31.

<sup>27</sup> Financial Reporting Council (FRC), *The UK Stewardship Code* (July 2010) (the Stewardship Code) at Principle 5.

and requiring those institutions that are committed to this form of engagement to ‘participate in a [FRC] survey to monitor adherence to the Stewardship Code.’<sup>28</sup>

The Stewardship Code proposals are relatively modest and, judging on past performance with soft law codes, are of doubtful effect. The one area where there are prospects for greater activism by institutional investors is in regard to foreign institutions but these will not be subject to the Code.<sup>29</sup> This raises serious questions regarding the potential efficacy of the Stewardship Code.<sup>30</sup> Whilst the UK’s efforts to foster soft law codes of conduct made considerable progress in the 1990s and were widely adopted in other parts of the world,<sup>31</sup> the limits of these codes have been increasingly recognised over the last decade.<sup>32</sup> The fact that foreign institutions will not be subject to the Code and the fact that the Code is soft law are both potential constraints on shareholder activism.

Another constraint on shareholder activism is the ‘free rider’ problem. In a country like the UK where share ownership is not concentrated among a few shareholders but is instead widely dispersed, an activist shareholder incurs substantial costs relative to the size of its shareholding while other shareholders share in the rewards without incurring any costs.<sup>33</sup> As

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<sup>28</sup> D. Walker, *A Review of Corporate Governance in UK Banks and other Financial Industry Entities: Final Recommendations* (26 November 2009) at Recommendations 18, 19 and 20.

<sup>29</sup> See further, M. M. Siems, *Convergence in Shareholder Law* (Cambridge, Cambridge University Press, 2008) at 118.

<sup>30</sup> B. R. Cheffins, ‘The Stewardship Code’s Achilles Heel’ (2010) 73 *Modern Law Review* 985 at 1017–1023.

<sup>31</sup> Cheffins has noted that Britain was something of an exporter in so far as Codes were concerned: B. Cheffins, ‘Corporate Governance Reform: Britain as an Exporter’ at <http://ssrn.com/abstract=215950>.

<sup>32</sup> See generally, E Wymeersch, ‘Corporate Governance Codes and Their Implementation’ (2006) at <http://ssrn.com/abstract=931100>; for another general study see R. V. Aguilera, and A. Cuervo-Cazurra, ‘Codes of Good Governance’ (2009) 17 *Corporate Governance: An International Review* 376.

<sup>33</sup> I. MacNeil, ‘Activism and Collaboration Among Shareholders in UK Listed Companies’, (2010) 5 *Capital Markets Law Journal* 419 at 428.

Walker admitted, fund managers may be reluctant to spend their members' funds on actions which may have significant free-rider benefits to those who do not contribute to the cost of such action; Walker listed this as the first reason why there was unwillingness among fund managers to use resources on enhanced engagement efforts.<sup>34</sup>

A more significant constraint is that any individual fund manager will have spread their funds around a number of firms so that it will by itself not have sufficient shareholdings in any one firm to have much influence if it decides to place pressure upon the company internally. Fund managers invest in several companies in order to minimise risk, diversify income streams for their funds and sometimes to comply with legal requirements, and in so doing, generate increased profits for their funds. This means that their holdings in any one company are relatively small.<sup>35</sup> It has, however, been argued that such fragmented share ownership poses a major stumbling block to shareholder activism by institutional investors and therefore significantly limits the chances of the Stewardship Code being a success.<sup>36</sup>

Institutional shareholders' capacity for concerted action is also seriously handicapped by, for example, rules regulating the activities of shareholders if they act in concert.<sup>37</sup> Where institutional shareholders hold more than ten per cent of a company's shares, they face regulatory constraints when they seek to collaborate and so cannot easily be involved in collective negotiation and engagement efforts with other shareholders without triggering

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<sup>34</sup> D. Walker, *A Review of Corporate Governance in UK Banks and Other Financial Industry Entities: Final Recommendations* (26 November 2009) at para 5.16.

<sup>35</sup> See generally, M M Siems, *Convergence in Shareholder Law* (Cambridge, Cambridge University Press, 2008) at 288–289.

<sup>36</sup> B. R. Cheffins, 'The Stewardship Code's Achilles Heel' (2010) 73 *Modern Law Review* 985 at 1020–1023.

<sup>37</sup> F. Curtiss, I. Levine and J. Browning, 'The Institutional Investor's Role in Responsible Ownership' in I. MacNeil and J. O'Brien (eds) *The Future of Financial Regulation* (Oxford, Hart Publishing, 2010) at 309–310.

some regulatory (takeover) rules.<sup>38</sup> Walker saw the need for the introduction of ‘safe harbour’ rulings to facilitate such collective actions by shareholders.<sup>39</sup> Very conveniently, both the Takeover Panel and the FSA issued guidance notes to deal with cases such as this.<sup>40</sup> The complexity of these arrangements nevertheless raises further obstacles to effective collective action against unresponsive boards.<sup>41</sup> However, these regulatory constraints do not apply to litigation against the company, unless the actions are taken in a takeover context.

On the other hand, the problems faced by individual small shareholders seeking to take action within the company are even greater than those facing larger shareholders. Thus, Walker noted that:

<quotation>...individual shareholders acting alone face almost insuperable barriers to successful participation in engagement activity, while the costs of gathering information and

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<sup>38</sup> D. Walker, *A Review of Corporate Governance in UK Banks and other Financial Industry Entities: Final Recommendations* (26 November 2009) at para 5.44.

<sup>39</sup> Ibid at para 5.45.

<sup>40</sup> The Takeover Panel noted these concerns and issued Practice Note 26 on 9 September 2009 to clarify circumstances in which collective initiatives by shareholders would be seen as being ‘control seeking’; see further at <http://www.takeoverpanel.org.uk/wp-content/uploads/2008/11/PS26.pdf>. The EU Acquisitions Directive (Directive 2007/44/EC) also requires that persons who act in concert notify the FSA where there is an intention to acquire more than ten per cent of shares in a company. The FSA has sought to provide some flexibility in this regard with guidance (issued on 19 August 2009) as to how it would deal with such activist shareholder actions; see further D. Walker, *A Review of Corporate Governance in UK Banks and other Financial Industry Entities: Final Recommendations* (26 November 2009) at 152.

<sup>41</sup> In Annex 7 of his Final Recommendations, Walker referred to the obstacles created by Rule 9 of the Takeover Code which seek to regulate collective initiatives by shareholders which may lead to a degree of control over a company on an on-going basis: see Walker *ibid* at 151.

co-ordinating large numbers of small investors make it impossible for them to have any meaningful impact on governance.<sup>42</sup> </quotation>

It was for this reason that Walker urged that a new engagement model be adopted by institutional shareholders in UK companies. Yet while individual shareholders face considerable obstacles to initiating effective litigation against their companies, institutional investors are not necessarily in a superior position. Siems points to research showing that institutional investors ‘are typically more informed and experienced than private investors....[but]...institutional investors are regarded as more risk-averse and conservative than other shareholders.’<sup>43</sup>

Although institutions may seem to have more resources, they are also subject to their mandates and they often usually adopt a short-term or quarterly view of stock prices. As a result, they may not be the solution to corporate governance problems that Walker suggests. These handicaps also apply to litigious actions that shareholders may contemplate.

In any event, Walker’s suggested engagement between institutional shareholders and their companies is a somewhat benign form of interaction. For example, one form of institutional activism in the use of voting powers occurs in narrow and somewhat contentious circumstances, such as the appointment and remuneration of directors, board composition and strategic issues affecting the rights of shareholders.<sup>44</sup> Walker however cautions against institutional shareholders organising negative votes against management proposals because of

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<sup>42</sup> D. Walker, *A Review of Corporate Governance in UK Banks and other Financial Industry Entities: Final Recommendations* (26 November 2009) at para 5.16.

<sup>43</sup> M. M. Siems, *Convergence in Shareholder Law* (Cambridge, Cambridge University Press, 2008) at 118.

<sup>44</sup> See further C. Mallin, ‘Institutional Investors: The Vote as a Tool of Governance’ (2010) *Journal of Management and Governance* 1.

the ‘potential embarrassment and tension that may surround negative voting’.<sup>45</sup> Surely this should not be the criterion which influences the way in which institutional investors exercise their duties as shareholders.

It is interesting to contrast this attitude with the approach taken by a number of institutional investors when News Corporation sought to relocate to Delaware and to strengthen managerial power vis-a-vis shareholders; in that situation a group of institutional investors commenced legal proceedings against News Corporation in the Delaware courts.<sup>46</sup>

But for Walker a negative vote should only be used ‘as a last resort’.<sup>47</sup> This cautious attitude mirrors previous practices by institutions as the situations in which they were likely to take such negative action before the financial crisis were relatively rare, and one doubts that a rebranded Stewardship Code will be likely to lead to more strident action on the part of fund managers.<sup>48</sup> Walker acknowledges that:

<quotation>The limited institutional efforts at engagement with several UK banks appear to have had little impact in restraining management before the recent crisis phase, and it is

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<sup>45</sup> D. Walker, *A Review of Corporate Governance in UK Banks and other Financial Industry Entities: Final Recommendations* (26 November 2009) at para 5.48.

<sup>46</sup> See further *UniSuper Ltd v News Corporation* (2005) WL 3529317 (Del Ch)); this case is discussed at length in J. Hill, ‘The Shifting Balance of Power between Shareholders and the Board: News Corp’s Exodus to Delaware and Other Antipodean Tales’ Sydney Law School Research Paper No. 08/20 at <http://ssrn.com/abstract=1086477>; J. Hill, ‘Subverting Shareholder Rights: Lessons from News Corp’s Migration to Delaware’ (2010) 63 *Vanderbilt Law Review* 1.

<sup>47</sup> D. Walker, *A Review of Corporate Governance in UK Banks and Other Financial Industry Entities: Final Recommendations* (26 November 2009) at para 5.49.

<sup>48</sup> I. MacNeil, ‘Activism and Collaboration Among Shareholders in UK Listed Companies’ (2010) 5 *Capital Markets Law Journal* 419.



noteworthy that levels of voting against bank resolutions rarely exceeded 10 per cent.<sup>49</sup>

If this continues to be the case we will need to look outside the corporation to see if more effective intervention might be available in the event of failure of internal mechanisms.<sup>50</sup> However apart from resort to the FRC's Codes, Walker appeared reluctant to urge greater legalisation of corporate governance responses. As his report noted:

The implicit preference embedded in the current UK corporate governance model is to focus principal attention on key matters such as the qualities of directors, the functioning of boards and appropriate incentive structures, with primary legislation and black letter regulation reserved for a limited array of prescriptive rules related to explicit obligations relating to disclosure and fiduciary duties.<sup>51</sup>

The strong conservative message that is implicit in the approach adopted by Walker is consistent with his background as a banker and helps to explain the support that his report has

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<sup>49</sup> D. Walker, *A Review of Corporate Governance in UK Banks and Other Financial Industry Entities: Final Recommendations* (26 November 2009) at 5.10.

<sup>50</sup> The EU Commission announced in June 2010 that it intended to undertake a corporate governance review which would include an examination of institutional investors' adherence to 'stewardship codes' of best practice': see EU Commission, *Green Paper on Corporate Governance in Financial Institutions and Remuneration Policies* (COM(2010) 285) (June 2010) at [http://ec.europa.eu/internal\\_market/company/docs/modern/com2010\\_284\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/com2010_284_en.pdf). It is obviously too soon to know what these outcomes will be, but these stewardship ideas are not new.

<sup>51</sup> D. Walker, *A Review of Corporate Governance in UK Banks and Other Financial Industry Entities: Final Recommendations* (26 November 2009) at para 1.17.

received from successive UK governments. He preferred to see improvements made to strengthen ‘an overall culture of good governance’ and opposed any resort to refining provisions of the Companies Act 2006 as being likely to undermine this culture and introduce a legalistic culture.<sup>52</sup> In these circumstances Walker warned of the dangers of litigation if his preferred model was not followed and he argued that:

<quotation>Migration from this model to a wider statutory approach would have profound implications, including not least the possibility that it would increase the vulnerability of boards to litigation.<sup>53</sup></quotation>

He therefore emphasised that new legislation or regulations should not be pursued as these ‘...may have little or no comparative advantage or relevance’ when seen in the context of ‘the powerful influence exerted by the FSA Handbook and the Combined Code process.’<sup>54</sup> This was of course a very narrow view as it ignores the fact that both kinds of approaches are required if there is to be adequate accountability.<sup>55</sup> It also ignores the vast body of academic research literature on litigation that emphasises the value of ‘bargaining in the shadow of the law’ and which sees it as a powerful tool; most cases of such bargaining do not lead to cases getting into the courtroom. But Walker effectively rejected the use of legal rules and

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<sup>52</sup> Ibid at para 2.23.

<sup>53</sup> Ibid at para 1.18.

<sup>54</sup> Ibid at para 1.20.

<sup>55</sup> See generally: D. McBarnet, A. Voiculescu, and T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge, Cambridge University Press, 2007); also see J. Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Cheltenham, Edward Elgar, 2008).

litigation and instead placed a high degree of faith in informal codes and the somewhat erratic comply or explain approach to corporate governance that has been adopted.<sup>56</sup>

Walker's championing of institutional investor engagement as the primary method of securing improved corporate governance and accountability largely ignores the counter-tendency that is so often discussed in the corporate law literature, namely, the rise of powerful boards and chief executives, or what has come to be accepted as the Director Primacy model of the corporation.<sup>57</sup> Under this 'nexus of contracts' inspired model the participation rights of shareholders are limited, but re-emerge in the form of the stated commitment of directors to seek to maximize shareholder welfare. In this way, shareholders are seen as beneficiaries, but are expected to remain on the sidelines or as 'bystanders'.<sup>58</sup> The managerial powers given to directors and the operation of the 'business judgement' rule makes it very difficult for shareholders to effectively challenge the dominance of directors in company decision making.<sup>59</sup> Our last line of defence in the UK seems to be the introduction of 'enlightened shareholder value' policies.<sup>60</sup> This approach offers the potential to be successful but whether or not it will ultimately be successful remains to be seen.

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<sup>56</sup> This is not the place to engage in a more detailed discussion of the reliability of Codes like the UK Code of Corporate Governance.

<sup>57</sup> See further S. Bainbridge, 'Director Primacy and Shareholder Disempowerment' (2006) 119 *Harvard Law Review* 1735. Also see S. Bainbridge, *The New Corporate Governance in Theory and Practice* (Oxford, Oxford University Press, 2008).

<sup>58</sup> J. Hill, 'Visions and Revisions of the Shareholder' (2000) 48 *American Journal of Comparative Law* 39, especially references at footnote 152.

<sup>59</sup> See however A. Keay, 'Company Directors Behaving Poorly: Disciplinary Options for Shareholders' (2007) *Journal of Business Law* 656 and J. Hill, 'The Rising Tension Between Shareholders and Director Power in the Common Law World' (2010) 18 *Corporate Governance: An International Review* 344.

<sup>60</sup> See generally S. Kairie, 'At the Crossroads: Shareholder Value, Stakeholders and Enlightened Shareholder Value: Which Road Should the UK Take?' (2006) 17 *International Company and Commercial Law Review* 329.

So where are we to go from here? The above discussion of the potential for shareholder activism within the corporation helps to identify the constraints that may be placed upon shareholder activism were it to be expressed in the form of litigation against the company or its officers; one can only suspect that there would not be much enthusiasm amongst institutions for this given the difficulties of generating action within the company itself.

The financial press has long played a significant role in shining light upon corporate governance failures. A good example of this is the criticism in the financial press of Sir Stuart Rose's continued role as Chairman at Marks and Spencer after his service as CEO. But despite its value, the press has its limits in monitoring the complex internal affairs of large listed companies.

Another means of external action is the use of more strident regulatory techniques, such as the FSA's fines on Northern Rock officers for actions taken in selling products prior to the onset of the crisis. A more active regulator is much to be welcomed, after the FSA's unsatisfactory experience with light-touch regulation.<sup>61</sup> This strident regulatory approach would apply especially in regard to regulated financial institutions, but the funding resources available to regulators for litigation are limited and sometimes need to be supplemented by government in high profile cases.<sup>62</sup>

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<sup>61</sup> See generally R. Tomasic, 'Beyond "Light Touch" Regulation of British Banks after the Financial Crisis' in I. MacNeil and J. O'Brien (eds), *The Future of Financial Regulation* (Oxford, Hart Publishing, 2010).

<sup>62</sup> For example, in the largest corporate prosecution in Australia following the collapse of the insurance company HIH, the Commonwealth Government made special allocations of funds to the Australian Securities Investments Commission (ASIC). Additional funds were also allocated to ASIC to fund high profile corporate prosecutions against James Hardy, OneTel and Offset Alpine. The preparedness of governments to fund unexpected corporate actions of this kind is essential if regulators are to be effective. See further Parliament of Australia, Joint Committee on Corporations and Financial Services, *Statutory Oversight of the Australian*

This leaves resort to the courts by shareholders. However as we have seen the courts are reluctant to deal with corporate matters until all internal avenues have been exhausted by litigants. This perhaps explains why so many cases have been brought by liquidators after the failure of companies. Shareholder actions, such as litigation, involve significant costs and have uncertain outcomes. There are also the wider collective action problems in widely held companies which discourage disparate smaller shareholders from organising themselves in order to challenge entrenched management teams, either through internal processes of the company, such as the general meeting, or through external processes, such as resort to the courts.

#### <a> IV. AN OVERVIEW OF SHAREHOLDER LITIGATION IN ENGLAND AND WALES SINCE 2000

It is interesting to undertake a somewhat limited analysis of the contours of company litigation under the UK Companies Act over the last decade. Using the Westlaw internet database, cases from 2000 to 2010 which were concerned with shareholders were examined. Excluded from the count were Scottish cases, European Court of Justice cases and Privy Council cases. A total of 115 relevant cases were revealed in this search; of these, 107 cases (or 93 per cent) were brought by individual shareholders and eight cases (or 6.9 per cent) were brought by institutions.

It is notable that litigation rarely concerns public companies; thus, over this period, 92.2 per cent of cases (106 cases) concerned a private limited company, one case involved a

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*Securities and Investments Commission* (May 2005), Ch 2 at:

[http://aph.gov.au/senate/committee/corporations\\_ctte/asic/asic\\_05/c02.hym](http://aph.gov.au/senate/committee/corporations_ctte/asic/asic_05/c02.hym) at paras 2.32 to 2.40.

foreign corporation whilst the remainder (eight cases or 6.9 per cent) concerned a UK public limited company. A total of 59.1 per cent (or 68 cases) were successful.<sup>63</sup>

The basis of the claims made in these company related cases varied, with the most common grounds involving claims of unfair prejudice (32.2 per cent) and membership or share related issues (24.3 per cent); these two areas covered more than half of all claims made. Also, some 14.8 per cent of cases involved shareholders' agreements; derivative claims arose in eight (or 6.9 per cent) of cases. Table 5.1 sets out these claims.

*Table 5.1 Type of legal claims litigated in England and Wales since 1 January 2000*

| <i>Type of legal claim</i>             | <i>Number of cases</i> | <i>Percentage of total cases</i> |
|--|------------------------|----------------------------------|
| Unfair prejudice (s.994 and old s.459) | 37                     | 32.2                             |
| Membership or share issue              | 28                     | 24.3                             |
| Shareholder agreements                 | 17                     | 14.8                             |
| Derivative claims                      | 8                      | 7.0                              |
| Human rights or judicial review        | 2                      | 1.7                              |
| Other claims                           | 23                     | 20.0                             |
| TOTAL cases                            | 115                    | 100                              |

<sup>63</sup> It might be argued that this pattern reflects what McQueen has described as the 'colonisation' of UK company law by partnerships and small firms in the late nineteenth century, so that company law mainly serves the needs of smaller companies: see further, R. McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920* (Farnham, Ashgate Publishing, 2009).

Of the above 115 cases (there were 153 defendants in total), fewer than half of the total defendants were shareholders (43.8 per cent), although 12.4 per cent of defendants were both shareholders and directors. Companies constituted 29.4 per cent of defendants.

Most cases involved solvent companies (88.7 per cent or 102 cases) and most were applications or first instance petitions (74.7 per cent), and 25 cases (or 21.7 per cent) were on appeal; four cases involved preliminary issues.

**Unfair prejudice cases:** A total of 37 unfair prejudice cases were brought either under the new s.994 of the Companies Act 2006 (10 cases) or under s.459 of the Companies Act 1985 (27 cases). Only two of these cases involved public companies.<sup>64</sup>

Shareholders were involved in a large proportion of these cases, with 43.3 per cent (or 23 cases) of defendants being shareholders; a third of defendants were companies (33.9 per cent) and eight directors (15 per cent) were defendants.

**Membership or share issue cases:** All of the membership or share issue cases involved private companies, with 96.4 per cent of these cases (or 27 cases) being brought by an individual; most of these cases were brought against other shareholders (52.9 per cent and six defendants were shareholders/directors (17.6 per cent of defendants). The issues arising in these membership or share related claims are set out in Table 5.2 (below).

**Shareholder agreement cases:** Of the less than 15 per cent of cases (17) involving shareholder agreements, only one case concerned a public company,<sup>65</sup> and institutional

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<sup>64</sup> *Rock (Nominees) Ltd v RCO (Holdings) plc (in members' voluntary liquidation)* [2004] EWCA Civ 118; [2004] BCC 466, in which case the alleged unfair prejudice in breach of s.459 was not substantiated; and *CAS (Nominees) Ltd v Nottingham Forest FC plc* [2002] BCC 145 in which case the alleged breach of s.459 was dismissed.<sup>5</sup>

shareholders were involved in making two claims, with the remaining claims being made by individuals. Of the 17 claims, 13 were successful (76.4 per cent), suggesting that the courts are more relaxed in dealing with these claims than with derivative actions (see below).

**Derivative actions:** Of the eight derivative action claims, only one of these involved a public company.<sup>66</sup> Seven cases involved individual shareholders with the remaining case being brought by an institutional shareholder. Of these cases, 37.5 per cent were successful, 25 per cent were adjourned and 37.5 per cent failed. Seven companies comprised defendants (or 46.6 per cent of defendants), with directors forming 2 per cent of defendants (or three defendants); the remaining defendants were shareholders (20 per cent) and shareholders/directors (13.3 per cent). These figures reflect a wider critique of the limited utility of derivative action proceedings.<sup>67</sup>

**Human rights cases:** This category is particularly interesting, bearing in mind the fact that there has been a rise in human rights cases concerning company-related matters.

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<sup>65</sup> See further *Holt v Faulks* [2001] BCC 50; [2000] 2 BCLC 816. In this case a shareholder applied to the court to implement a clause in a shareholder agreement and sought summary judgment against a company's former executive director seeking a transfer notice for his shares in the company.

<sup>66</sup> See further *Harley Street Capital Ltd v Tchigirinsky (No 2)* [2005] EWHC 1897 (Ch); [2006] BCC 209. The court refused the application that involved claims of breaches of fiduciary duty and a dilution of the fourth defendant company's interest in a joint venture. A freezing injunction was discharged.

<sup>67</sup> See generally A. Reisberg, 'Derivative Claims under the Companies Act 2006: Much Ado About Nothing?' in J. Armour and J. Payne (eds), *Rationality in Common Law: Essays in Honour of DD Prentice* (Oxford, Hart Publishing, 2009). Also see A. Keay and J. Loughrey, 'Something Old, Something New, Something Borrowed: An Analysis of the New Derivative Action under the Companies Act 2006' (2008) 124 *Law Quarterly Review* 469.



There were two human rights and judicial review cases initiated by shareholders during the period since 2000, both involving public companies.<sup>68</sup>

Both cases were defended by a government agency. The first case involved the Treasury Commissioner and arose in relation to the claims by former Northern Rock plc (Northern Rock) shareholders who challenged the basis upon which they had been compensated when Northern Rock had been nationalized. In the other case, shareholders in the Railtrack group brought an action against the Secretary of State for Transport claiming misfeasance by the Secretary for his plan to place the company into administration on the grounds of insolvency.

In both cases, the key ground relied upon by the shareholders was the claim that their property rights had been infringed in contravention of human rights provisions. It seems that all possible company law causes of action were found wanting. In the case involving Railtrack it was argued that the proposed plan infringed Article 1 of Protocol 1 of the European Convention on Human Rights contained in the Human Rights Act 1998 Schedule 1 Part II Article 1. The case involving Northern Rock shareholders also involved claims that there had been a contravention of Article 1 of Protocol 1 of the European Convention on Human Rights. The Northern Rock case will be discussed more fully in the next section.

**Other cases:** Of the remaining 23 cases (20 per cent of all cases), two involved public companies,<sup>69</sup> 20 cases concerned UK private companies and one case concerned a company

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<sup>68</sup> See further *R (on the application of SRM Global Master Fund LP) v Commissioners of HM Treasury* [2009] EWCA Civ 788; [2010] BCC 558 and *Weir v Secretary of State for Transport (No 2)* [2005] EWHC 2192 (Ch).

<sup>69</sup> See further *Hall v Cable and Wireless plc* [2009] EWHC 1793 (Comm); [2011] BCC 543. In this case the shareholders claimed that the company had wrongfully failed to disclose material information to the market thereby causing loss to the shareholders. In finding for the company the court held that the defendants did not have a cause of action for breach of the listing rules or for the alleged market abuse. The second case was *Thakrar v Ciro Citterio Menswear plc (in administration)* [2002] EWHC 1975 (Ch) in which the claimant

that was not incorporated in the UK. Of these 23 cases, 15 involved solvent companies; four were insolvent, two were under administration, one had ceased trading and one was in receivership.

One case involved an institutional shareholder and all other cases involved individual shareholders. Table 5.3 sets out the types of claims made in each of these cases, showing that the first three categories of case, winding up cases, cases involving procedural issues and administration proceedings, comprised 52.1 per cent of cases.

*Table 5.2 Membership or share-related claims in England and Wales since 1 January 2000*

| <i>Type of legal claim</i>                              | <i>Number of cases (out of 28)</i> | <i>Percentage of total membership or share cases</i> |
|---|------------------------------------|--|
| Share transfer, sale, purchase or acquisition of shares | 11                                 | 39.2   |
| Meeting, resolution, articles of association claim      | 3                                  | 10.7   |
| Valuation claim   | 3                                  | 10.7   |
| Register of members issue                               | 3                                  | 10.7   |
| Entitlement to shares issue                             | 5                                  | 17.8   |
| Entitlement to funds or assets issue                    | 2                                  | 7.1  |
| Board of directors issue                                | 1                                  | 3.6  |

sought a declaration that the defendant company was bound by the terms of a settlement agreement. The court found in favour of the claimant ordering specific performance of the agreement.

Table 5.2 shows that out of the 28 membership or share related claims, 11 (39 per cent) of them related to share transfers, sales, purchases or the acquisition of shares. This represents by far the largest cause of action for membership or share related claims. Interestingly only one claim (3.6 per cent) concerned an issue relating to the board of directors, suggesting that shareholders are perhaps more interested in their own personal interests as shareholders rather than their responsibilities, as owners, to hold directors to account.

*Table 5.3 Types of legal claims made in the residual category of 23 cases*

| <i>Type of legal claim</i>  | <i>Number of cases (out of 23)</i> | <i>Percentage of total cases</i> |
|-----------------------------|------------------------------------|----------------------------------|
| Winding up proceedings      | 5                                  | 21.7                             |
| Procedural issues           | 5                                  | 21.7                             |
| Administration proceedings  | 2                                  | 8.7                              |
| Breach of agreement/deed    | 2                                  | 8.7                              |
| Negligence                  | 2                                  | 8.7                              |
| Breach of Listing Rules     | 1                                  | 4.3                              |
| Deprivation of assets issue | 1                                  | 4.3                              |
| Breach of fiduciary duty    | 1                                  | 4.3                              |
| Disqualification            | 1                                  | 4.3                              |
| Fraud                       | 1                                  | 4.3                              |

|                          |   |     |
|--------------------------|---|-----|
| Misapplication of assets | 1 | 4.3 |
| Deceit                   | 1 | 4.3 |

The residual category of ‘other claims’ reported in Table 5.3 shows that winding up proceedings, administration proceedings and procedural issues comprise over half of the remaining cases. The remainder deal with a variety of legal breaches. The numbers are too small to allow for any generalisations to be made about them.

#### [a] V. THE NORTHERN ROCK PLC SHAREHOLDER APPEAL<sup>70</sup>

When the House of Commons Treasury Committee undertook its inquiry into the failure of Northern Rock, it focused attention primarily on the business model used by the bank and the conduct of its regulators and directors. It did not delve too deeply into the position of the Northern Rock shareholders, although it did take a fairly negative view as to their prospects when it observed that:

<quotation>It is unfortunate that the shareholders who acquired their shares as part of demutualisation and the staff of Northern Rock have suffered significantly from the fall in the value of Northern Rock shares. However, it is not possible to make a distinction between types of shareholders in the circumstances of Northern Rock. In a market environment,

<sup>70</sup> The following section draws upon R. Tomasic, ‘Shareholder Litigation and the Financial Crisis: The Northern Rock Shareholder Appeal Considered’ (2009) 262 *Company Law Newsletter*, October 29 2009, at 1–5.

shareholders as a whole must be viewed as taking a risk from which they sought a reward and for which they are now paying a price.<sup>71</sup>

This would not have been a comforting observation for the shareholders. The decision of the Court of Appeal in the appeal by Northern Rock shareholders following the nationalisation of Northern Rock and the subsequent compulsory acquisition of their shares is an important statement of the role of legal mechanisms in periods of major financial crises. The Court's rejection of the appeal in *R (on the application of SRM Global Master Fund LP) v Commissioners of HM Treasury*<sup>72</sup> identified key drivers of the legal response and highlighted the relatively weak position of shareholders of banks, such as Northern Rock, that failed during the global financial crisis.

These key drivers included the legislative framework which was put in place by the UK Parliament following the passage of the Banking (Special Provisions) Act 2008. This hastily passed enactment laid down the assumptions that should be followed by the Treasury - appointed independent valuer when deciding on the amount of compensation that should be paid to former shareholders of nationalized banks.<sup>73</sup> In the end this meant that the resolution of the appeal largely became a matter of statutory interpretation. Also driving the legal response was the knowledge of central banks which act as lenders of last resort (LOLR) in times of crisis. The Court of Appeal was to turn to this body of economically-inspired principles to provide the basis for its decision when it accepted the importance of this body of thought, as expressed by the former Governor of the Bank of England Lord Eddie George.

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<sup>71</sup> The House of Commons Treasury Committee, *The Run on the Rock* (HC 56-1) (January 2008) at 20–21.

<sup>72</sup> [2009] EWCA Civ 788; [2010] BCC 558.

<sup>73</sup> See further R. Tomasic, 'The Rescue of Northern Rock: Nationalisation in the Shadow of Insolvency' (2008) 1(4) *Corporate Rescue and Insolvency* 109.

Reference was made by Lord George to earlier statements regarding the LOLR that had been made by Walter Bagehot following the collapse and subsequent run on Overend, Gurney & Co in 1866. A 1993 speech delivered by Lord George served to set out the principles that the Court of Appeal regarded as fundamental in this case. In doing so, the Court of Appeal was prepared to recognise the importance of economic concepts such as ‘moral hazard’ as providing a basis for the policy that had been adopted by the Bank of England and the UK government.<sup>74</sup>

Another notable feature of this appeal is that the principal legal foundations of the shareholders’ action were not found in insolvency law or in company law principles, but in the application of European human rights law concepts as developed by the European Court of Human Rights. In particular, the decision of the Court of Appeal rested on the interpretation of Article 1 of the First Protocol (A1P1) of the European Convention on Human Rights which guarantees the protection of private property.<sup>75</sup> The case law under this provision developed the principles to be applied in the payment of compensation following

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<sup>74</sup> Moral hazard in banking refers to the tendency of banks to take on more risk by, for example increasing leverage or investing in riskier assets, at the expense of the public safety net: see T. Padoa-Schioppa, *Regulating Finance: Balancing Freedom and Risk* (Oxford, Oxford University Press, 2004) at 99. Interestingly, governments were prepared to ignore this constraint when they offered financial assistance to failing firms as the concept of moral hazard was seen as less important than maintaining the stability of the banking system.

<sup>75</sup> Article 1 provides: ‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’

the compulsory acquisition of property by the State.<sup>76</sup> This meant that little room remained for the application to this case, by way of analogy or otherwise, of commercial law principles from other areas, such as the law of salvage and principles of unjust enrichment.<sup>77</sup>

#### <b> a) Legal and Economic Background Factors

In August 2007 Northern Rock experienced difficulties in sourcing funds to support its lending; it had grown rapidly to become the fifth largest UK mortgage lender, but relied upon an unsustainable business model that depended upon the continued availability of short term funds. The collapse of the sub-prime mortgage bubble in the US had a direct effect upon the ability of the bank to continue to operate.<sup>78</sup>

The failure of Northern Rock is notable in that it was seen as potentially jeopardising the stability of the entire UK financial system. News that the company had sought financial support from the Bank of England led to a run on the bank after 13 September 2007. Thereafter the Chancellor of the Exchequer authorized the Bank of England to provide emergency support as lender of last resort (LOLR).

This support was aimed at injecting stability and confidence into the banking system and the Chancellor also sought to guarantee deposits to quell the bank run. This eventually

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<sup>76</sup> See further T. Allen, *Property and the Human Rights Act 1998* (Oxford, Hart Publishing, 2005); also see generally R. P. Malloy, *Private Property, Community Development and Eminent Domain* (Farnham, Ashgate, 2008).

<sup>77</sup> *R (on the application of SRM Global Master Fund LP) v Commissioners of HM Treasury* [2009] EWCA Civ 788; [2010] BCC 558 [2009] EWCA Civ 788; [2010] BCC 558 at [64–66].

<sup>78</sup> See further R. Tomasic, ‘Corporate Rescue, Governance and Risk-taking in Northern Rock: Part 1’ (2008) *Company Lawyer* (2008) 297 and R. Tomasic, ‘Corporate Rescue, Governance and Risk-taking in Northern Rock: Part 2’ (2008) 29 *Company Lawyer* 330.

led the Bank of England to lend some £27 billion to Northern Rock. This temporary relief was primarily aimed at stabilising the UK banking system and avoiding contagion.

Nationalisation became necessary as a suitable private sector solution had not been forthcoming. Nationalisation took place immediately after the passage of special legislation, the Banking (Special Provisions) Act 2008, on 21 February 2008; this enactment was replaced a year later by the Banking Act 2009.<sup>79</sup>

The Banking (Special Provisions) Act 2008 allowed for the making of compensation orders on designated terms. Critically, s.5(4) of this Act required an independent valuer, when making a valuation, to assume that ‘all financial assistance provided by the Bank of England or the Treasury to the deposit-taker in question has been withdrawn...’ and that ‘no financial assistance would in future be provided by the Bank of England or the Treasury to the deposit-taker....’<sup>80</sup>

Furthermore, the Northern Rock Plc Compensation Scheme Order 2008 (made under s.5 of the 2008 Act) provided that the amount of compensation that would be payable would be ‘an amount equal to the value immediately before the transfer time of all shares in Northern Rock’<sup>81</sup> and that the valuer must assume that Northern Rock was ‘unable to continue as a going concern’ and that it was in administration.<sup>82</sup>

The case brought by the Northern Rock shareholders was first heard by Burton LJ and Silber J in the Queen’s Bench Division, who handed down their judgment on 13 February

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<sup>79</sup> See further R. Tomasic, ‘Creating a Template for Banking Insolvency Law Reform After the Collapse of Northern Rock: Part 1’ (2009) 22(5) *Insolvency Intelligence* 65 and R. Tomasic, ‘Creating a Template for Banking Insolvency Law Reform After the Collapse of Northern Rock: Part 2’ (2009) 22(5) *Insolvency Intelligence* 81.

<sup>80</sup> Banking (Special Provisions) Act 2008 s.5(4).

<sup>81</sup> Northern Rock plc Compensation Scheme Order 2008 (SI 2008/718) Sch 1 Part 2 para 3.

<sup>82</sup> *Ibid* para 6.



2009 in *R (on the application of SRM Global Master Fund LP) v Commissioners of HM Treasury*.<sup>83</sup> The appeal was heard in June 2009 and the decision handed down on 28 July 2009.<sup>84</sup> Laws LJ, with whom the Master of the Rolls and Waller LJ agreed, delivered the judgment dismissing the appeal.

The shareholders bringing the appeal comprised two hedge funds (SRM and RAB) that respectively held 11.5 per cent and 8.18 per cent of the shares in Northern Rock, although these shares had been acquired after the Government announced that it would provide financial assistance to the bank. Perhaps this was the last gasp of hedge fund activism.<sup>85</sup> The remaining party bringing the action represented small shareholders: there were some 150,000 small shareholders at the date of the nationalisation. It is interesting to note that prior to September 2007 institutional investors had been docile and largely content to allow bank boards to engage in highly risky business strategies of the kind pursued by Northern Rock, Halifax Bank of Scotland plc (HBOS) and the Royal Bank of Scotland plc (RBS).

The Bank of England, the FSA and the Treasury, known as the Tripartite Authorities, had previously entered into a Memorandum of Understanding (MOU) regarding their respective roles in a situation of crisis. This MOU included the Bank's role as LOLR aimed primarily at reducing 'the risk of a serious problem causing wider financial or economic

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<sup>83</sup> [2009] EWHC 277 (Admin); [2009] BCC 251.

<sup>84</sup> *R (on the application of SRM Global Master Fund LP) v Commissioners of HM Treasury* [2009] EWCA Civ 788; [2010] BCC 558.

<sup>85</sup> See further J. Armour and B.R. Cheffins, 'The Rise and Fall (?) of Shareholder Activism by Hedge Funds', ECGI – Law Working Paper No 136/2009. Also see A. Klein and E. Zur, 'Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors' (2009) 64 *Journal of Finance* 187.

disruption’ so as to ‘minimise both moral hazard in the private sector and financial risk to the taxpayer....’<sup>86</sup>

The Court of Appeal noted that the ‘precise purpose of LOLR, and the conditions under which it may be made available, are of great importance for the issues in this appeal’.<sup>87</sup> The court went on to quote at length from a speech by Lord George in which he explained the nature of the LOLR function of seeking to protect the system from ‘contagion’ and the principles that the Bank applied in exercising this function. The court quoted Lord George’s statements that:

<quotation>Our support, whatever form it takes, is directed to safeguarding the financial system....Beyond that, there are various rules we apply. *First*, we will explore every option for a commercial solution before committing our own funds....*Second*, central banks are not in the business of providing public subsidy to private shareholders. If we do provide support, we will try to structure it so that any losses fall first on the shareholders and any benefits come first to us....*Third*, we aim to provide liquidity: we will not, in normal circumstances, support a bank that we know at the time to be insolvent....*Fourth*, we look for a clear exit....<sup>88</sup></quotation>

Lord George had also noted that in order to avoid ‘moral hazard’ (or the expectation that banks will be rescued when they act recklessly) when liquidity support is provided under

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<sup>86</sup> Memorandum of Understanding between the Bank of England, the Financial Services Authority and HM Treasury at <http://www.bankofengland.co.uk/financialstability/mou.pdf> at para 15.

<sup>87</sup> *R (on the application of SRM Global Master Fund LP) v Commissioners of HM Treasury* [2009] EWCA Civ 788; [2010] BCC 558 at [6].

<sup>88</sup> *Ibid* at [8].

a LOLR facility, the support is provided ‘on terms that are as penal as we can make them’.<sup>89</sup>

As the Court of Appeal summarised this central bank instrument: ‘[t]he constraints and conditions described by Lord George – last resort, selectivity, unpredictability, no comfort for the shareholders, clear exit – are all fashioned, in part at least, to avoid the hazard’.<sup>90</sup>

The Court of Appeal found that these principles were applied to the handling of Northern Rock. In doing so it rejected the view that the Bank of England was seeking to profit from its intervention in Northern Rock; indeed, financial modelling conducted for the government by its external advisers cast doubt upon any such profit being forthcoming.<sup>91</sup>

#### **<b> b) Legal Issues before the Court of Appeal**

One major and two minor legal issues dominated argument by the appellants before the Court of Appeal. The principal issue argued by the appellants was that they had been deprived of their shares for little or nothing as a result of the assumptions that had been imposed on the valuer by the Parliament. It was argued (by Lord Pannick QC) that this was in conflict with the property rights of the shareholders under A1P1 of the European Convention on Human Rights.

It was also argued that the Government was well rewarded for the financial assistance that it had provided to Northern Rock. In response, it was argued (by Jonathan Sumption QC) that the aim of the Banking (Special Provisions) Act 2008 was quite clear in seeking to put the shareholders in the same position that they would have occupied if Northern Rock had not

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<sup>89</sup> Ibid at [9].

<sup>90</sup> Ibid at [11].

<sup>91</sup> Ibid at [26].

received financial support from Government; in other words, that the business was worthless without Government support.

In finding in favour of the respondents, the Court of Appeal identified three governing principles that had emerged out of the European case law on the protection of property rights under A1P1 of the Convention. These three key principles were: ‘(1) the need for a fair balance to be struck between public interest and private rights; (2) the principle of proportionality; (3) the doctrine of margin of appreciation’.<sup>92</sup>

According to Laws LJ, the first principle requiring that a balance be struck between the public interest and private rights is the overarching principle. The next two principles provide the means by which such a balance is to be struck.<sup>93</sup> As for the second principle, proportionality ‘allows for controlled intrusions into a right in question in pursuance of a legitimate aim; but in every case the intrusion must be proportionate to the aim’.<sup>94</sup> As earlier European cases have shown, there must be a ‘reasonable relationship of proportionality between the means employed and the aim to be realised’.<sup>95</sup> This would apply to the compensation terms that were offered and would ordinarily require the payment of an amount reasonably related to the value of the property taken.<sup>96</sup>

However these first two principles must be read with the third principle, that of the ‘margin of appreciation’. This doctrine had previously been summarised by Lord Hope of Craighead in *R v DPP ex parte Kebilene*<sup>97</sup> and had been applied in *James v UK*,<sup>98</sup> which

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<sup>92</sup> Ibid at [43].

<sup>93</sup> Ibid at [55].

<sup>94</sup> Ibid at [46].

<sup>95</sup> Ibid at [47].

<sup>96</sup> Ibid at [55].

<sup>97</sup> [2000] 2 AC 326 at 380.

<sup>98</sup> (1986) 8 EHRR 123.

gave it a very broad meaning. It assumes that national governments are in the best position to evaluate local needs and conditions and implies that the balance between the private interest and the public interest will not be uniformly struck across every case. As the Court of Appeal stated, for example, citing *Lithgow v UK*,<sup>99</sup> nationalisation is quite different from a compulsory purchase order given the complexity of nationalisation and its objectives, and the standard of compensation payable may differ.<sup>100</sup> Any application of the margin of appreciation doctrine under the European Convention on Human Rights will be driven by a democratic imperative. As a result, the judiciary will defer to the opinion of the elected legislature and only interfere with its decision as to nationalisation and the level of compensation payable if the judiciary concluded that the State's judgment was manifestly unreasonable.<sup>101</sup> The Court of Appeal accepted that this would lead one to ask whether the assumptions in s.5(4) of the 2008 Act were 'manifestly without reasonable foundation?'<sup>102</sup>

As to this the court held that the assumptions in the legislation regarding the making of compensation orders were reasonable. It found that the assumptions put the shareholders in the position they would have occupied had no LOLR support been provided.<sup>103</sup> It concluded:

<quotation>If the shareholders had received more favourable treatment than was furnished by these arrangements, the LOLR operation would...have been the source of a specific benefit

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<sup>99</sup> (1986) 8 EHRR 329.

<sup>100</sup> *R (on the application of SRM Global Master Fund LP) v Commissioners of HM Treasury* [2009] EWCA Civ 788; [2010] BCC 558 at [52] citing *Lithgow v UK* (1986) 8 EHRR 329 at [121].

<sup>101</sup> Ibid at [59] and [75].

<sup>102</sup> Ibid at [60] and [62].

<sup>103</sup> Ibid at [77].

conferred on them. That would not be consistent with a governing principle of LOLR, namely its deployment only in the interest of the financial system as a whole.<sup>104</sup>

The court rejected arguments that the rescue involved no risk to the Government and that it was motivated by the desire for profit.<sup>105</sup> It accepted testimony from a senior Government official (Kingman) and from the Government's advisers (Goldman Sachs) that these were not the motives behind the rescue.<sup>106</sup> It was seen to be particularly telling that no private sector party was prepared to come to the assistance of Northern Rock, illustrating the level of perceived risk that the Government was assuming in this rescue.<sup>107</sup> The court also rejected arguments to the effect firstly that the FSA (and the Bank of England) had a duty to protect Northern Rock shareholders<sup>108</sup> and secondly that there was a failure to provide procedural safeguards to protect AIP1 rights, finding that the availability of judicial review provided such a safeguard.

The Court of Appeal adopted the view expressed in the court below that the primary responsibility for the insolvency of Northern Rock lay with its management, and that its management was answerable to its shareholders, who could ultimately have removed the directors.<sup>109</sup> Yet under normal circumstances the directors of Northern Rock would not have owed a legal duty to their shareholders - their duty was to the company. The inadequate state of the law on the duties of directors meant that little joy could be had from shareholder actions (whether derivative suits or otherwise) against the directors of Northern Rock. This

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<sup>104</sup> Ibid at [62].

<sup>105</sup> Ibid at [68–69].

<sup>106</sup> Ibid at [69].

<sup>107</sup> Ibid at [72].

<sup>108</sup> Ibid at [80–81].

<sup>109</sup> Ibid.

meant that a human rights claim was something of a last resort for the appellants.<sup>110</sup> Overall the outcome of the Northern Rock shareholder appeal illustrates the limited scope that bank shareholders have in seeking to rely upon normal company law remedies and other avenues of redress in banking crises.

## <a> VI. CONCLUSIONS

This chapter has sought to deal with an area of some concern to company law scholars, namely, the extent to which company law is actually enforced. The traditional Holmesian view would see law as an expression of what courts do.<sup>111</sup> This is certainly a prevailing American and Realist view, although it is less prevalent in the UK with its long tradition of laissez faire approaches to company law.

In more recent times, the emergence of institutional investors as powerful parts of the corporate landscape has raised questions about their capacity to contribute more to corporate governance and to monitor and even control aberrant management. For the last two decades the UK has sought to use soft law as a means of dealing with managerial conduct, despite the legislative codification and extension of common law rules regarding the duties of directors of UK companies. The Walker Review has been embraced by government representatives in the UK and as such we are likely to see a continuation of a voluntary soft law approach, even though its effectiveness may be questioned.

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<sup>110</sup> See generally R. Tomasic, 'Raising Corporate Governance Standards in response to Corporate Rescue and Insolvency' (2009) 2 *Corporate Rescue and Insolvency* 5.

<sup>111</sup> For a discussion of this theme of differences between US and UK approaches to law see W. Twining, *Globalisation & Legal Theory* (London, Butterworths, 2000).

The presence of some company law litigation maintains the myth that the courts have a role to play in the enforcement of company law. To a certain extent the enforcement of company law does take place through the involvement of lawyers and the advice that they give to their clients. Lawyers have, however, also shaped company law in such a way that the prospects for successful litigation against directors of large public companies, such as directors of failed UK banks and financial institutions, are somewhat remote.

There is clearly a major divide in the way the courts are used by shareholders in the US and in the UK. In many ways we have tended to follow American legal ideas and it may be that (perhaps through the influence of US investment funds) we might see more company law litigation against banks and financial institutions in the UK. However the prospects for this are really quite remote.

Finally as the Northern Rock shareholder appeal has shown, even where actions are brought before the courts, it has been difficult to find causes of action that are likely to lead to successful outcomes for litigants; instead we have seen a failed resort to human rights arguments. This is, in part, a desperate attempt to overcome the difficulties associated with bringing successful shareholder actions based on more traditional company law principles. It can also perhaps be attributed to the development of public law principles of accountability which has not been contained by a market driven laissez-faire approach.